

FILED

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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ADOLFO NOLASCO-SALAZAR,

Defendant - Appellant.

No. 04-50536

D.C. No. CR-04-01284-IEG

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Submitted February 13, 2006^{**}

Before: FERNANDEZ, RYMER, and BYBEE, Circuit Judges.

Adolfo Nolasco-Salazar appeals from the 30-month sentence imposed after he pled guilty to unlawful re-entry following deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Because Nolasco-Salazar was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the district court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional error under *United States v. Booker*, 543 U.S. 220 (2005)).

Nolasco-Salazar's other contentions are foreclosed by this circuit's case law. *See United States v. Velasquez-Reyes*, 427 F.3d 1227, 1228 (9th Cir. 2005) (rejecting contention that prior convictions must be proved to a jury if not admitted by the defendant and reaffirming that *Almendarez-Torres v. United States*, 523 U.S. 224 (2005) has not been overruled); *United States v. Ochoa-Gaytan*, 265 F.3d 837, 845-46 (9th Cir. 2001) (holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) carved out an exception for prior convictions that specifically preserved the holding of *Almendarez-Torres*); *see also United States v. Castillo-Rivera*, 244 F.3d 1020, 1025 (9th Cir. 2005) (rejecting contention that

the fact of the temporal relationship of the removal to the prior conviction is beyond the scope of the Supreme Court's recidivism exception).

SENTENCE REMANDED